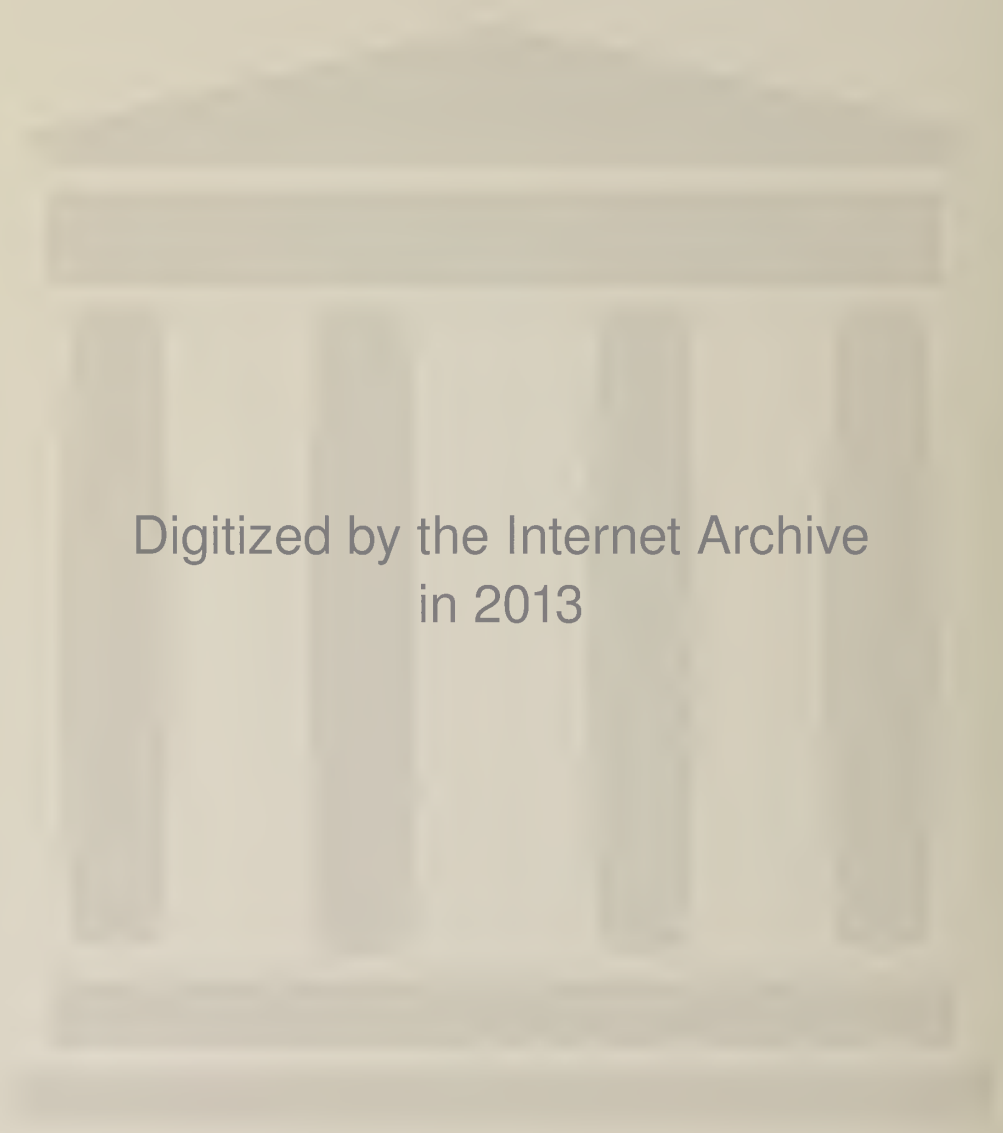
Annual Report 1989

Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

Ontario



ANNUAL REPORT

1989

505 University Avenue

7th Floor

Toronto, ON

M5G 1X4

(416) 598-4638 FAX: (416) 965-5134

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INTRODUCTION

The Workers' Compensation Appeals Tribunal is a tripartite tribunal established in 1985 to hear appeals from the decisions of the Ontario Workers' Compensation Board. It is a separate and self-contained adjudicative institution, independent of the Board.

This report is the Tribunal Chairman's and the Tribunal's annual report to the Minister of Labour and to the Tribunal's various constituencies. It describes the Tribunal's operational experience during the reporting period and covers particular matters which seem likely to be of special interest or concern to the Minister or to one or more of the Tribunal's constituencies. The reporting period for this report is the 1989 calendar year.

This is the first annual report to be titled "Annual Report". Its three predecessors, distinctively titled because of their special role in recording the Tribunal's formative years, were the "First Report", the "Second Report" and the "Third Report". They cover respectively the periods of October 1, 1985, to September 30, 1986; October 1, 1986, to September 30, 1987; and the fifteen month period from October 1, 1987, to December 31, 1988.

This Annual Report comprises, in effect, two reports: The Chairman's Report and the Tribunal Report. The Chairman's Report reflects the personal observations, views and opinions of the Chairman. The Tribunal Report covers the Tribunal's activities and financial affairs, and developments in its administrative policy and process.

THE CHAIRMAN'S REPORT

THE TRIBUNAL'S PERFORMANCE : CHAIRMAN'S ASSESSMENT

The Tribunal's Statement of Mission, Goals and Commitments adopted by the Tribunal in 1988 and reproduced as Appendix A to the Third Report and again as Appendix A to this Report continues to represent the criteria of performance which the Tribunal believes to be appropriate. I am satisfied that throughout 1989 the Tribunal successfully performed its Mission and made significant strides towards meeting its Goals, while continuing to be faithful to its Commitments.

The Tribunal's production goal is stated in the Statement of Mission, Goals and Commitments as: "...a total case turnaround time from notice of appeal or application to final disposition that averages four months, and in individual cases, unless they are of unusual complexity or difficulty, does not exceed six months."

The turnaround times are steadily improving. The reporting year saw the implementation of the restructuring approved at the end of 1988 and described in the Third Report together with other re-organization and process adjustment devoted particularly to decreasing the time the Tribunal spends, on average, during the pre-hearing preparation of each case. These efforts were complicated by personnel and administrative changes in the Tribunal Counsel Office and in Intake, and the full benefit was only beginning to be felt at the end of the year.

Nevertheless, in 1989 about 200 entitlement cases were completed from start to finish within roughly the four-month period, and the average turnaround time for decisions released in 1989 is substantially improved.

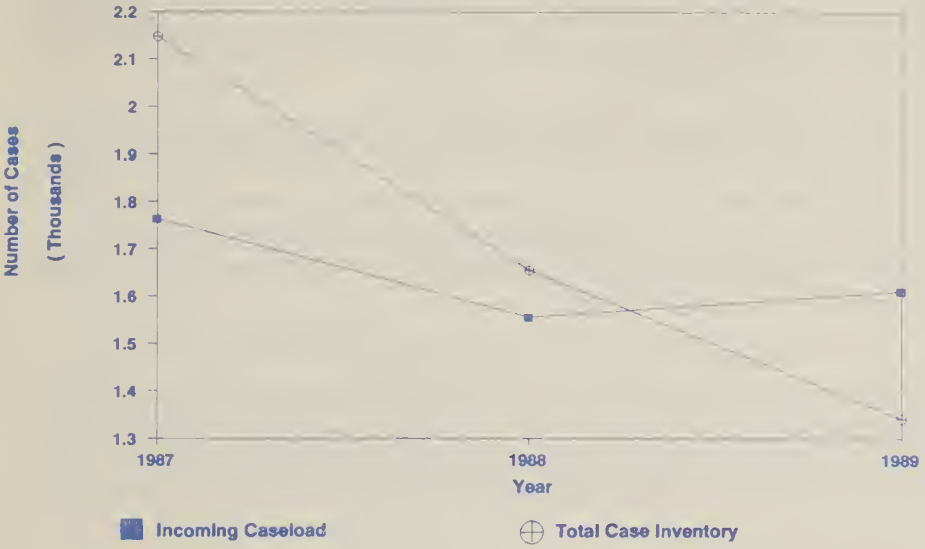
The continuing improvement in the Tribunal's overall production times may be seen in broad terms from the graph on the next page showing for each year since 1987 the total of new cases received during the year and the total case inventory as of the end of the year. The graph shows that the total case inventory at the end of 1989 is about 60 per cent below what it was at the end of 1987. Since the number of new cases received each year has remained relatively constant, this reduction is mainly reflective of improvements in the Tribunal's efficiency.

Out-of-Toronto cases present special difficulties as far as turnaround times are concerned by virtue of the impracticability of every-day scheduling of out-of-Toronto hearings and, as we now appreciate, limitations in the advocacy resources available in out-of-Toronto locations. As will appear from the report on the Tribunal's scheduling activities, we continue to experiment with various different strategies for improving the out-of-Toronto turnaround experience.

Whether with existing resources, and without sacrificing the quality of decision-making, it will in the end prove, in fact, to be possible to achieve a four-month, overall average turnaround time still remains unclear. We will be in a better position to answer that question by the end of 1990.

TREND ANALYSIS

Incoming Caseload vs Total Case Inventory



The Tribunal's 1989 turnaround performance is to be assessed in the context of a year in which the Tribunal received 1,600 and disposed of 2,000 appeals or other types of applications including 1,125 by fully reasoned, written decision reached after full hearings.

I am especially pleased, as well, to be able to report that the Tribunal's turnaround performance in the particularly important area of decision-writing has consolidated the major 1988 improvement and produced even better decision-writing times in 1989. The details in this respect will be found in the Tribunal Report dealing with the Appeals Process.

BILL 162 AMENDMENTS : TRIBUNAL IMPLICATIONS

In assessing the Tribunal's performance and gauging its ability to meet and sustain adequate standards of production, it is naturally necessary in this 1989 Annual Report to take account of the Bill 162 amendments to the Workers' Compensation Act enacted just as 1989 came to a close. The reliability of my previous observations concerning the Tribunal's capacities are, of course, implicitly conditional upon the additional resources that will be needed to deal with what seems likely to be substantial additional burdens.

It is impossible at this point in time to estimate with confidence the full extent of Bill 162's ultimate impact on the Tribunal's workload. However, there can be little doubt that the impact will be substantial.

To begin with, appeals under the return-to-work part of the new legislation present a completely new jurisdiction for the Tribunal in which, ultimately, the number of appeals seems potentially very high. And while at this stage, the workload implications of the introduction of the wage-loss pension provisions are not as clear — these provisions replace existing provisions and from a workload perspective are likely to cut both ways — it is reasonable to expect that those changes too will ultimately produce a substantial net increase in the Tribunal's workload.

The four separate decisions that will now be required in every case of permanent partial disability seems likely, for instance, to be the source of significant increase in the number of appeals per case overall. I refer to the non-economic lump sum determination, and the first, second and final decisions on the wage loss, each of which is ap-

pealable. Furthermore, the value of what is at stake in individual appeals has been increased on average, since, under a wage-loss system, a higher proportion of appeals may be expected to at least potentially involve claims for full pensions. Accordingly, it may be anticipated that a higher proportion of claims rejected by the WCB's Hearings Officers will now be appealed.

It is also clear that the Tribunal will have to respond particularly quickly to the Bill 162 cases. This need is especially evident with respect to appeals in the new right-to-return-to-work cases, but it will also be important in the first round of appeals under the new wage-loss system for compensating permanent partial disabilities. The orderly development of that new system will depend on expeditious handling of the interpretation issues in the early cases.

The strategy the Tribunal has adopted for dealing with what Bill 162 will send its way, is to lay the groundwork in the next few months to accommodate a rapid 20-per-cent increase in the Tribunal's resources as soon as the first wave of Bill 162 cases begins to take shape. We propose to then work with those resources until we can make a realistic assessment of resource needs based on the developing experience.

SECTION 86n AND THE FINAL-SAY ISSUE

As was noted in the Third Report, as of the end of 1988 the key issue as to the ultimate effect of the WCB Board of Directors' powers under section 86n of the Act had yet to be addressed.

Decision No. 42/89 (1989), 12 W.C.A.T.R. 85, is the first decision in which the Tribunal was called upon to consider the final-say issue. In that case, the outcome depended on whether or not the Tribunal followed the Board of Directors' decision in its section 86n review of *Decision No. 72* (1986), 2 W.C.A.T.R. 28. (I will hereafter refer to a Board of Directors' 86n decision as an "86n review decision".) The issues of policy and general law dealt with in that review decision were the interpretation of the statutory definition of "accident" and the applicability of the section 3(3) presumption. (This is the only 86n review decision to have issued by the end of 1989.)

The specific question for the *Decision No. 42/89* Panel was the effect on subsequent Tribunal decisions of a Board of Directors' decision in an 86n review of a prior Tribunal decision. However, in considering that question, the *42/89* Panel felt that it was also important to first consider the effect of such a decision in the case in which it is made.

In a majority decision, the Tribunal indicated in *Decision No. 42/89* that as long as a Board of Directors' 86n review decision was properly authorized by the terms of section 86n and was not beyond the Board's jurisdiction by reason of being patently unreasonable, it was by law binding on the Tribunal in the case in which it was made. The *42/89* Panel decided, however, that an 86n review decision in one case was not binding in subsequent cases. In subsequent cases, the Tribunal was obliged to treat such decisions with deference and to follow them unless there were very compelling reasons not to do so, but it was not *bound* by the decision.

In *Decision No. 42/89* itself, the Tribunal concluded that, in respect of the definition of accident and its impact on the applicability of the presumption clause, the Board of Directors' review of *Decision No. 72* and the Tribunal's *Decision No. 72* itself were both so clearly wrong, to such substantial effect, that notwithstanding the deference intrinsically owed to an 86n review decision it was the Tribunal's duty in this case not to follow either decision.

The question of whether or not to subject *Decision No. 42/89* to a section 86n review was considered by the Board of Directors at its meeting on November 10, 1989. At that meeting, the Directors decided not to review the decision. For the time being, and pending the receipt of further decisions from the Tribunal on these issues, the WCB's staff were directed to implement the Tribunal's order in *Decision No. 42/89*, but to continue to administer the definition of accident and the applicability of the presumption clause in accordance with the Board of Directors' decision in its review of *Decision No. 72*.

The Directors also directed the Board's staff to conduct a general review of the Board's policies concerning the determination of entitlement to benefits in respect of workers' deaths from unknown or uncertain causes in employment circumstances — the problem with which the Tribunal had been faced in *Decision No. 42/89*.

The effect of the Board's decision not to review *Decision No. 42/89* is that for the time being the Board's adjudicators will continue to apply the interpretation of accident approved in the Directors' review of *Decision No. 72*, while the Tribunal may well follow the interpretation in *Decision No. 42/89*. Fortunately, the nature of the issue is such that not many cases will in fact be affected by this difference, but it is not a situation that should continue indefinitely.

It is my own view that the Board of Directors is right to confine the cumbersome and onerous 86n procedure to the business of resolving issues of major importance between the Board and the Tribunal only at the point where a full understanding of the nature and dimension of the issue has developed and the possibilities of reconciling or eliminating the conflict between the Tribunal and the WCB by other means or through other processes have been exhausted. It is that view of 86n which I take to be reflected in the Board of Directors' decision not to review *Decision No. 42/89* at this time.

It should be noted, of course, that the decision not to review *Decision No. 42/89* has also postponed the occasion for the Directors themselves to decide whether in their opinion section 86n ultimately gives the final say to the Tribunal or to the Board of Directors.

HIGHLIGHTS OF THE 1989 CASE ISSUES

The Third Report provided a sample of some of the important issues — legal, factual and medical — addressed by the Tribunal in 1988. The following is intended to update some of those issues and note a few new ones encountered in 1989. They are presented in no particular order of importance. Unfortunately, it is impossible in a report of this size to do more than highlight a few areas.

PENSION ASSESSMENTS

Tribunal panels are continuing to gain experience in the difficult area of pension assessments. The Tribunal's general approach to pension assessments and use of the rating schedule remains the same.

While the Tribunal often accepts the expert views of the Board's evaluation teams, the Tribunal has undertaken its own pension assessments in a number of cases where there was important new medical evidence, or where an aspect of the disability had not previously been assessed by the Board. For example, in *Decision No. 172/89* (1989), 11 W.C.A.T.R. 292, the Tribunal accepted the report of a senior psychologist which suggested that further tests should have been performed and awarded a pension for the worker's impairment of cognitive function which had not previously been assessed.

In several cases, the Tribunal has determined that a different benchmark from that applied by the Board more accurately reflected the worker's impairment of earning capacity. See *Decision Nos. 407/88* (1989), 12 W.C.A.T.R. 30 and *31/89* (1989), 10 W.C.A.T.R. 351.

In other cases, the Tribunal has found that it was more appropriate to refer the pension assessment back to the Board, and direct that it be carried out again in light of the Tribunal's findings.

The compliance with the requirements of the Act of the Board's policy on compensating multiple injuries (or entitlement to a "multiple factor" as it is sometimes called) has also been raised in a few cases. See *Decision Nos. 831/88* (1989), 10 W.C.A.T.R. 334 and *412/88* (June, 28, 1989)(Ont. W.C.A.T.). Another interesting case is *Decision No. 275/89I* (May 23, 1989)(Ont. W.C.A.T.) which commented on assessments for white finger disease.

PENSION SUPPLEMENTS

The Tribunal continues, of course, to view the Act as taking individual circumstances which affect the impact of an injury on a particular worker's earning capacity into account only through the pension supplements and older worker supplements provisions — not through the pension provisions themselves. (This will change with respect to permanent disabilities covered by the Bill 162 amendments.)

It now seems to be generally accepted that the Board has at least a discretion — and perhaps an obligation — to refuse a vocational rehabilitation supplement where the supplement would not have any rehabilitative purpose. An early case to the contrary appears now to have been an anomaly.

Decision No. 915 (1987), 7 W.C.A.T.R. 1 left open the question of whether this analysis would also apply to wage loss supplements; however, *Decision No. 466/89* (1989), 11 W.C.A.T.R. 369 held that such supplements were not intended to be permanent and also required a rehabilitative purpose.

The Tribunal has had occasion to consider entitlement to vocational rehabilitation supplements in a variety of situations. See, for example, *Decision No. 399/88* (1989), 10 W.C.A.T.R. 205 which dealt with a worker who relocated to an area of high unemployment to live with her family. *Decision No. 375/89* (1989), 11 W.C.A.T.R. 336 distinguished between entitlement to a temporary supplement for vocational rehabilitation and to discretionary rehabilitation payments. While a worker may not jeopardize his entitlement to a supplement by developing his own rehabilitation programme, he cannot demand that the Board pay discretionary benefits toward the cost of such a programme.

TRANSITIONAL SUPPLEMENT PROVISIONS IN BILL 162

The only provisions of Bill 162 to come into force during 1989 were the transitional sections providing for the payment of supplements. *Decision Nos. 729/89* (1989), 12 W.C.A.T.R. 251 and *916/89* (1989), 12 W.C.A.T.R. 279 found that these transitional provisions do not apply retroactively. Previously enacted supplement provisions have no force or effect after July 26, 1989, but remain in force respecting entitlement to benefits accrued prior to that date.

EARNINGS BASE

A number of cases have considered how the earnings base for calculating entitlement to benefits should be determined. For instance, should tips, bonuses, overtime, and employer-paid benefits (e.g., dental plans and free lunches) be included in the calculation of the earnings base? And for purposes of the pre-accident earnings calculation how should pre-accident lay-off periods for which unemployment benefits have been paid be treated? How should supplements paid during make-work programmes be treated? See *Decision Nos. 934/88* (1989), 11 W.C.A.T.R. 196, *994/88I* (1989), 11 W.C.A.T.R. 210, *994/88* (1989), 12 W.C.A.T.R. 61 and *712/87* (1989), 12 W.C.A.T.R. 7.

OCCUPATIONAL DISEASE

Disabilities arising from exposure to chemicals or work processes continue to be an area of particular difficulty from an adjudicative perspective. The Tribunal's approach is to treat such disabilities as compensable where they fall within the statutory definition of "industrial disease" and related provisions, or within the disablement branch of the definition of "accident".

Occupational disease cases are frequently complicated because medical science has not advanced to the point where the causes of many diseases are fully known. In some cases, it may be impossible for medical science to even investigate the causation question because the conditions which are alleged to have caused the disability no longer exist and cannot be duplicated. Despite this lack of scientific certainty, the Tribunal is still required by statute to make a determination for compensation purposes. In such cases, a determination must be made on the balance of probabilities, as the statute requires. For an interesting discussion of this issue, see *Decision Nos. 94/87* (1989), 11 W.C.A.T.R. 20 and *214/89* (Mar. 22, 1989)(Ont. W.C.A.T.).

However, it has been held that where the etiology of the disease is entirely unknown, the statutory presumptions regarding industrial disease do not apply. In those circumstances, the disease also cannot be treated as a compensable disablement, since there is no demonstrated connection to the work-place. See *Decision No. 328/89* (1989), 11 W.C.A.T.R. 321.

OCCUPATIONAL STRESS

The Third Report noted the difficulties in adjudicating work-place stress claims and referred to the two-step inquiry suggested by the majority in *Decision No. 918* (1988), 9 W.C.A.T.R. 48:

a) Was the worker subjected to work-place stress demonstrably greater than that experienced by the average worker?

b) If not, was there "clear and convincing evidence" that the ordinary and usual work-place stress predominated in producing the injury?

Decision No. 536/89 (Sept. 6, 1989)(Ont. W.C.A.T.) accepted the *Decision No. 918* test, but found that the worker's state of mind was not compensable since it was not a true psychological disturbance but a reflection of her anger and frustration caused by a labour relations problem.

Decision No. 1018/87 (1989), 10 W.C.A.T.R. 82 reviewed *Decision No. 918* in detail and interpreted the reference to a "preponderance factor" as a response to the difficulties of adjudicating gradual mental stress claims and not an intention to create a higher standard of proof. *Decision No. 1018/87* took the view that in stress claims, as in other

claims, the question is whether the evidence is persuasive, on a balance of probabilities test, that the work is a significant contributing factor to the disability. Applying this standard, the Panel found that the stress was not compensable.

CHRONIC PAIN AND FIBROMYALGIA

Appendix C to the Third Report reviewed the development of the Tribunal's and Board's treatment of chronic-pain and fibromyalgia cases in some detail. The Appendix noted that the Tribunal had not yet had occasion to consider whether the Board's chronic-pain policy complied with the Act and that the Board had not yet completed its 86n review of the Tribunal's chronic-pain cases. This remains the case as well at the end of this reporting period.

The Tribunal has had occasion to consider whether it has jurisdiction to deal with chronic-pain claims in cases which have been treated as organic claims by the Board's adjudicators. *Decision No. 638/89I* (1989), 12 W.C.A.T.R. 221 held that the Tribunal has a broad jurisdiction to determine the entitlement to benefits generally and that it is preferable to assess entitlement on a "whole-person" basis. In that case, evidence of chronic-pain had been before the Hearings Officer and the Tribunal Panel concluded that the Hearings Officer decision must be treated as a final decision on the non-organic, as well as the organic, aspects. In *Decision No. 693/89I* (1989), 12 W.C.A.T.R. 236 the Tribunal found that the fact that a chronic-pain case had been referred back to the Board under *Practice Direction No. 9* (1987), 7 W.C.A.T.R. 444 did not deprive the Tribunal of its jurisdiction to consider the whole person. The fact that the Board had developed a new policy which might affect the issue did not retroactively deprive the Tribunal of its jurisdiction.

The Tribunal is not required to refer cases which, on appeal, are seen for the first time to involve a potential chronic-pain claim back to the Board because of any lack of jurisdiction. However, there may be cases where the Tribunal, in exercising its discretion to set the issue agenda on the appeal, determines that it is more appropriate for the Board to determine the chronic-pain issue first. [See, for example, *Decision No. 501/89* (Nov. 27, 1989)(Ont. W.C.A.T.)]

The implications and legitimacy of the "special confidence" concept which was developed in *Decision No. 915* were considered in *Decision No. 182* (1988), 10 W.C.A.T.R. 1. *Decision No. 915* stated that, because of the inherent difficulties in assessing the legitimacy of subjective pain complaints, it is right for adjudicators to feel the need for special confidence in the credibility of a chronic-pain claimant. The majority in *Decision No. 182* denied a chronic-pain claim because on the evidence it found it lacked this "special confidence"; however, the dissenting panel member criticized the concept.

The Third Report also noted that *Decision No. 18* (1987), 4 W.C.A.T.R. 21, which recognized fibromyalgia as a disabling condition caused by organic pathology which could result from an industrial accident, had not been included in the Board's 86n review of chronic-pain cases. Instead, the Board undertook a staff review of its policy concerning fibromyalgia. Based on the similarities between a diagnosis for fibromyalgia and one for chronic pain, the staff recommended and the Board of Directors approved the inclusion of fibromyalgia under the Board's chronic-pain policy, including its policy not to pay benefits prior to July 3, 1987, for chronic-pain conditions.

In another case, *Decision No. 669/87F* (1989), 11 W.C.A.T.R. 54, after reviewing considerable medical evidence, the Tribunal concluded that there is a pattern of signs and symptoms which are sufficiently consistent and clinically distinct to recognize fibromyalgia as a syndrome. It determined that it did not have to decide the appropriateness of including fibromyalgia in the Board's chronic-pain policy but that, in any event, the retroactivity limit in that policy was not applicable to fibromyalgia. Unlike

chronic pain, the Board had previously compensated fibromyalgia on a case-by-case basis; evidentiary problems rather than policy reasons had prevented compensation in fibromyalgia cases.

The Board of Directors subsequently agreed with the Tribunal's reasoning in *Decision No. 669/87F* and made benefits for fibromyalgia fully retroactive.

THE RELATIONSHIP WITH THE OMBUDSMAN

The Third Report noted that at the end of its reporting period the Tribunal had received the first report from the Ombudsman which supported a complaint. The Ombudsman recommended that the Tribunal reconsider a part of *Decision No. 95* (1986), 2 W.C.A.T.R. 61.

The Tribunal Chairman referred the Ombudsman's report to a panel, with the request that the panel determine whether:

a) the fact that the Ombudsman had issued a report was in and of itself sufficient reason for the Tribunal to conclude that it was advisable to re-open a decision and embark on a reconsideration of that decision and

b) if not, whether the content of this report provided sufficient reason to re-open this decision for the purpose of considering whether or not it should be changed in any particular. If the answer to either of the questions was yes, then that Panel was also to conduct the reconsideration of the case.

The Office of the Ombudsman was invited to participate in the hearings on these issues, but it declined to do so, as it did not consider itself a party to the Tribunal's process. The worker whose complaint the Ombudsman had, in part, supported, was represented at the hearing by a personal representative, not the Ombudsman.

Decision No. 95R (1989), 11 W.C.A.T.R. 1 determined that the Tribunal's normal two-step reconsideration process should apply when responding to an Ombudsman's recommendation. The Tribunal is required by statute to determine the initial "threshold" question of whether it is advisable to re-open a decision for the purpose of reconsidering, and it cannot delegate this decision, even to the Ombudsman. The Tribunal is also required to provide the parties with a full opportunity for a hearing before the Tribunal on this threshold question as well as on the reconsideration itself. Since the Ombudsman is a neutral entity, even the party whose complaint has been supported may wish to make additional submissions on these issues, as was the case in *Decision 95R*.

Decision No. 95R also discussed the different standards of review applied by the Tribunal as compared to the Ombudsman, and the different interests which each have. The Tribunal must consider not only the individual case but also the Tribunal's role in dispensing justice in a large number of cases. Therefore, the Tribunal has a high standard for re-opening final decisions for reconsideration.

The Panel determined that it was not advisable to re-open *Decision No. 95*, since even at face value the factual considerations and arguments presented by the Ombudsman and parties did not identify a defect so potentially significant as to justify reconsideration.

THE COMPENSABLE, WORK-INJURY RELATIONSHIP

As discussed previously, *Decision No. 42/89*, the first Tribunal decision to address the final-say issue, disagreed with the Board of Directors' views concerning the definition of "accident" and the applicability of the section 3(3) presumption clause. *Decision No. 42/89* was also a case which attempted to reconcile a number of Tribunal

decisions which appeared to give conflicting interpretations of the presumption clause and, in particular, of what standard of evidence is required to rebut the presumption of work-relatedness when the presumption applies. The Decision dealt with the difficult problem of how to approach the compensability issue in respect of a worker found dead, alone at a remote work site where the actual cause of the death cannot be determined.

Issues of work-relatedness may be found addressed in various forms in numerous decision issued in 1989, and they are far from being finally resolved.

The concepts of personal injury by accident *in the course of employment* and *arising out of employment* continued through 1989 to be particularly troublesome in the face of non-straightforward injury circumstances such as fights, drug abuse and the like.

OTHER

The Tribunal has also been concerned with a wide variety of other issues, ranging from the compensability of on-the-job heart attacks [e.g., *Decision Nos. 10/88* (1989), 10 W.C.A.T.R. 138, *11/89* (Mar. 7, 1989)(Ont. W.C.A.T.), and *42/89*], to distinctions between independent operators and workers [e.g., *Decision Nos. 860/88* (June 20, 1989)(Ont. W.C.A.T.) and *813/89* (1989), 12 W.C.A.T.R. 269], to the question of whether an accident is so remotely connected to the work-place that the worker's right to sue is not removed by the Act [e.g., *Decision No. 701/88* (1989), 11 W.C.A.T.R. 150].

During this reporting period, there have also been a number of cases dealing with issues of particular interest to employers [for example, *Decision Nos. 845/88* (1989), 11 W.C.A.T.R. 154, *94/89* (1989), 11 W.C.A.T.R. 260 and *563/87* (Jan. 6, 1989)(Ont. W.C.A.T.), which dealt with penalty assessments, and *Decision Nos. 131/87* (1989), 10 W.C.A.T.R. 51 and *234/89* (1989), 12 W.C.A.T.R. 181, which dealt with employer classifications].

The Tribunal has also had occasion to consider the unique nature of its role as an investigative tribunal and to refine its practices and procedures. For example, *Decision No. 40/87* (1989), 10 W.C.A.T.R. 33 considered limits on cross-questioning where the worker-witness suffered from health problems; *Decision No. 1248/87R* (1989), 11 W.C.A.T.R. 103 addressed the function and legitimacy of the Tribunal's three-week rule for disclosing documents, and *Decision Nos. 355/88* (1989), 10 W.C.A.T.R. 194 and *580/87* (Dec. 28, 1988)(Ont. W.C.A.T.) considered the applicability of the legal doctrine of issue estoppel to Tribunal proceedings. In the context of considering issues respecting the re-payment of benefit overpayments, the Tribunal has also considered the availability under its "real merits and justice" mandate of the doctrine of innocent detrimental reliance. See *Decision No. 182*.

JUDICIAL REVIEW ACTIVITY

In 1989, the Appeals Tribunal was served with applications for Judicial Review regarding *Decisions Nos. 799/87* (Sept. 3, 1987)(Ont. W.C.A.T.) and *462/88* (Nov. 23, 1988)(Ont. W.C.A.T.R.). Both cases were section 15 applications. In *Decision No. 799/87*, the Tribunal found the worker's right of action was taken away by the Act. This application is still pending. In *Decision No. 462/88* , the Tribunal found it did not have the jurisdiction to determine whether the right to bring an action in Pennsylvania was taken away by the Act. The Divisional Court heard this case on February 7, 1990, and dismissed the application stating:

> *We are all of the view that the Appeals Tribunal did not err in concluding that the words "in Ontario" are necessarily implied in s.15 of the Workers' Compensation Act. The Appeals Tribunal carefully reviewed the issue in its reasons for decision and in our view decided the issue in its reasons for decision and in our view decided the issue correctly. There is very little we can add to that decision.*

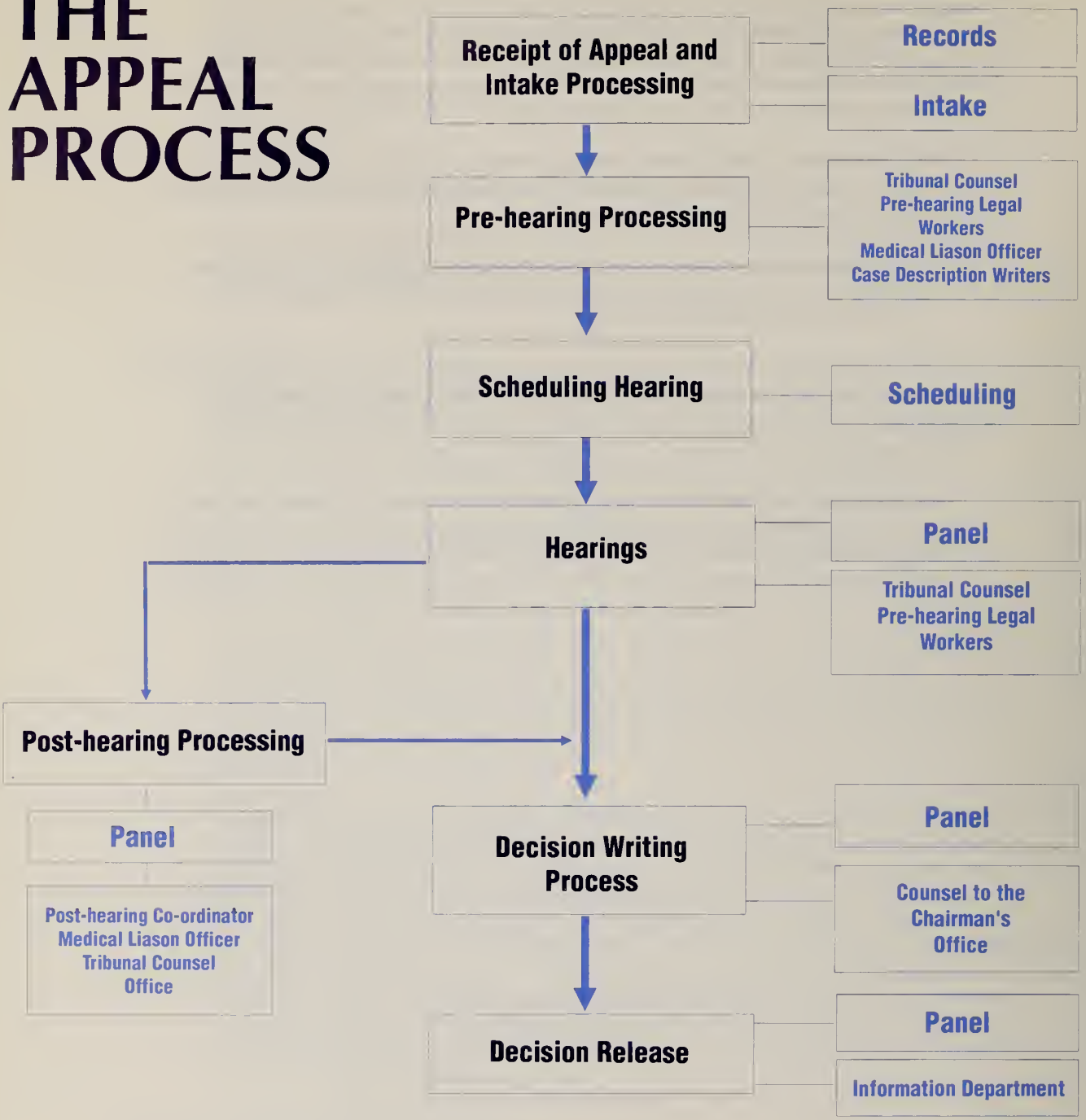
A Judicial Review application regarding *Decision No. 698L* (Feb. 17, 1987)(Ont. W.C.A.T.), a leave decision, was heard in Divisional Court on January 13, 1989. The court dismissed the application stating:

> *We do not think the tribunal is compelled to give leave simply because it might have come to a different decision. That doesn't necessarily mean there is good reason to doubt the correctness of the decision.*

Four other applications for Judicial Review were withdrawn by the applicant in 1989 [*Decision Nos. 510/87* (Apr. 3, 1989)(Ont. W.C.A.T.), *60/88* (Mar. 18, 1988)(Ont. W.C.A.T.), *198/88* (Apr. 29, 1988)(Ont. W.C.A.T.), and *199/88* (Apr. 29, 1988)(Ont. W.C.A.T.)].

In addition to these Judicial Review applications, the Appeals Tribunal was made a party to an application to the Supreme Court of Ontario under Rule 14 of the Rules of Civil Procedure regarding *Decision No. 696/88* (1989), 10 W.C.A.T.R. 308. The decision in that case is reported in *Re Canada Post Corp and Canadian Union of Postal Workers et al.; Workers' Compensation Appeals Tribunal, Intervener* (1989), 70 O.R. (2d) 394.

THE APPEAL PROCESS



Special and Administrative Services

- Computer Services
- Finance and Administration
- French Translation Services
- Information Department (Library and Publications)
- Personnel and Human Resources
- Reproduction and Mail Room
- Secretarial Services
- Statistical Services (Data Processing and Reports)
- Word Processing Centre

THE TRIBUNAL REPORT

VICE-CHAIRMEN, MEMBERS AND STAFF

Lists of Vice-Chairmen and Members, senior staff and Medical Counsellors active during the reporting period, as well as a record of roster changes, and résumés for newly appointed Vice-Chairmen and Members will all be found in Appendix B.

THE APPEALS PROCESS[1]

RECEIPT OF APPEALS & INTAKE PROCESSING

Records

The Records Centre includes the mail room and copy centre. It is responsible for providing administrative support to the Tribunal's operations.

In 1989, the Tribunal completed a review of its records system to determine compliance with the requirements of the Freedom of Information and Protection of Privacy Act. The Tribunal is currently considering the recommendations that emerged from this review process, including computerizing the records management system, implementing increased security for personal information and storing file information on microfiche.

TCO/Intake

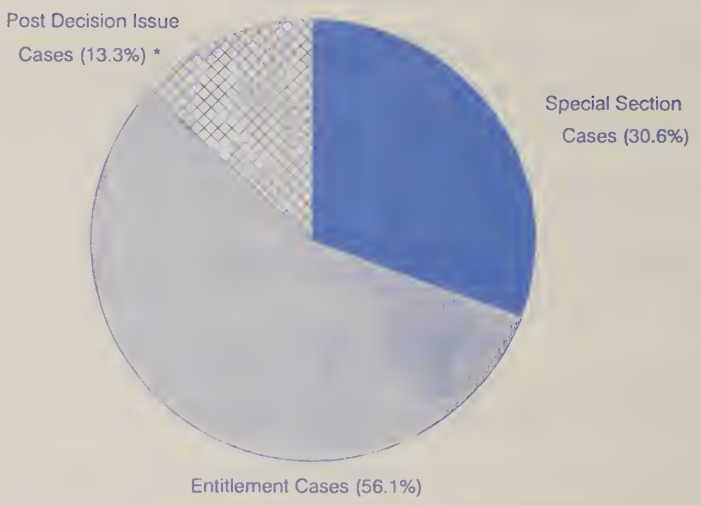
A major initiative was undertaken this year to integrate the Tribunal's Intake Department with the Tribunal Counsel Office.

The Intake Department, in addition to handling all incoming appeal applications and the public's questions about appeals and about the appeals process, has been responsible for all the Tribunal's "special section" cases. The special section cases include Section 77 access to information cases, Section 21 employer requests for medical examinations, and Section 15 cases on the right to maintain civil actions for damages. These cases constitute approximately 30 per cent of the Tribunal's incoming appeals and often involve complex legal questions.

1 This process has been represented graphically as a flow chart on the facing page.

The decision to integrate the two departments, which were formerly separate, was based on a desire to provide consistent treatment for all cases as well as speedier processing of cases. Special section cases now receive the same treatment as other cases, including the creation of a case description by the case description writers, and preparation for hearing by the pre-hearing legal workers. The integration was well under way by the end of the reporting period.

Incoming Caseload by Type for 1989



*Post Decision Issue Cases include reconsideration applications, Ombudsman's inquiries and judicial review cases.

PRE-HEARING PROCESSING

Tribunal Counsel Office

The streamlining of the Tribunal's internal procedures, and the adoption of the average four-month turnaround goal for appeals in 1989, has resulted in the restructuring of the Tribunal Counsel Office, including the integration of the Intake Department. Lawyers in the Counsel office now supervise the special section cases and will continue in this role until the process of integration is complete.

The four-month goal requires that case descriptions be completed in all cases according to a standardized model and within certain time limits. The process of implementing and integrating the organizational changes that were necessary was well under way by the end of 1989.

Lawyers continue to review the more complex cases to determine whether there is a need for additional legal research, factual information, or medical evidence. The Medical Liaison Officer (MLO) reviewed about 300 case descriptions in 1989 to assist Counsel with the question of whether additional medical information is required, and if it is, whether it can be obtained from the treating physician or from a Tribunal section 86h Assessor.

1989 Incoming Caseload by Type

Description	1989 (12 Months)	% of Total
New Cases by Type of Appeal†:		
Special section cases:		
S.86o	44	2 7
S.15	89	5.5
S.21	66	4.1
S.77	294	18.2
Subtotal	493	30.6
Entitlement and other cases:		
Pension	39	2 4
Commutation	35	2.2
Employer	28	1 7
Entitlement and Other	701	43.5
Subtotal.	803	49.8
Cases with no jurisdiction:		
Subtotal	100	6.2
Total new appeals received	**1,396**	**86.7**
Post-decision issue cases:		
Judicial review	2	0 1
Ombudsman s request	110	6.8
Reconsideration application	103	6.4
Subtotal	215	13.3
TOTAL INCOMING CASES	**1,611**	**100.0**

† Based on the date of receipt of WCB files

SCHEDULING OF HEARINGS

Beginning in January 1989, the Scheduling Department, under the supervision of the Appeals Administrator, moved to a system that includes:

a) Scheduling cases immediately on completion of the case description so that even cases requiring additional pre-hearing work receive a hearing date and become "date driven".

b) Scheduling cases according to a "modified" consent system, so that cases are scheduled as much as possible in accordance with the parties' convenience but in any event within a certain time period. If the parties cannot agree on a date, the cases are scheduled at a time convenient to the appellant.

Representation Profile for Decisions Released in 1989

Employer

Type of Representation	Number of Cases	Percentage
Claims Department	18	2
Consultant	88	7
Company Personnel	186	16
Office of the Employer Adviser	60	5
Lawyer	211	18
Other	123	10
No Representation	495	42
Total:	**1,181**	**100**

Worker

Type of Representation	Number of Cases	Percentage
Consultant	102	9
Lawyer	246	21
Member of Provincial Parliament	32	3
Office of the Worker Adviser	341	29
Union	201	17
Other	58	5
No Representation	201	17
Total:	**1,181**	**100**

The reorganization arising from the move to the four-month average turnaround goal generated a one-time "backlog" of cases in scheduling. In June 1989, there were 525 cases in scheduling; however, by the end of December 1989, that number had been reduced to 328 cases.

In 1989, about 50 per cent of the requests for hearings were for locations outside of Toronto. The waiting time for hearings in out-of-Toronto locations is two to three months longer than for Toronto hearings. In 1989, the Scheduling Department began to address this problem by bringing parties and their representatives to Toronto, if they agreed, and by scheduling additional hearings in certain locations. However, at the end of the reporting period, parties outside Toronto still waited longer for a hearing. Because of the projected Bill 162 caseload implications, the Tribunal is planning to add additional full-time panels, and it is expected that this development will help with the out-of-Toronto caseload.

The Tribunal has continued to schedule full- and part-time Panels to hear cases. Part-time Members participated in approximately 30 per cent of the cases in the reporting period.

Pre-hearing legal workers routinely contact the parties prior to each hearing to ensure that all materials required for the hearing have been provided and that the parties are ready to proceed. This contact has proved invaluable to the smooth running of the hearing process.

HEARINGS

The Tribunal scheduled 1,360 hearings in 1989; 1,061 of those cases had an oral hearing and 102 were considered on written submissions. The continuing strict "no adjournment" policy meant that only 2.3 per cent of cases were adjourned pre-hearing; a further small number were settled or withdrawn after being scheduled and prior to the hearing; 6.5 per cent were adjourned at the hearing.

The Tribunal Counsel Office lawyers attended hearings in about ten per cent of the cases. Generally, their in-hearing role was to examine expert medical witnesses and to assist the Panels with the legal questions in the more complex cases or in those cases that raised novel issues.

The increasing requests for hearings outside Toronto have been noted above. The problem this presents for expeditious processing of cases is not easily resolved. Often, there are only one or two worker representatives (usually from the Office of the Worker Adviser) available for workers in regions outside Toronto, so the answer is not simply to schedule more hearings in those locations — the representatives would be over-burdened. The strategy of inviting parties and their representatives to Toronto (and paying their expenses) is also only of limited advantage: again, the representatives are not always available to spend several days away from their offices. Also, OWA representatives handle the WCB hearings as well as WCAT hearings and have a heavy caseload in their own locations.

The Tribunal has taken some steps to provide parties outside Toronto with speedier access to hearings — in appropriate cases we bring parties and their representatives to Toronto, paying the expenses of the parties and their representatives; in 1989 we scheduled additional trips to some locations; and we have arranged conference-call hearings in straightforward cases, including those under Section 21 of the Act. The Tribunal will continue to explore ways of providing better service in this area in 1990.

The Tribunal instituted a "Motions Day" in 1988 and 1989 to provide a speedy process for certain cases under sections 21 and 77 of the Act which are "interlocutory" or preliminary in nature. These cases are scheduled on a date fixed by the Tribunal before a Panel which hears three or four similar cases on the same day. Parties have a fixed time to present their case, and Panels may deliver the decision orally.

Disposition of Cases in 1989

Monthly Increments

†		Feb											
New cases received	131	141	146	119	163	142	124	129	173	114	126	104	1,611
Cases disposed of:													
• Settled													
• No Jurisdiction							6		2	8			
• Withdrawn										24			
• Cases closed due to inactivity										15			
• Cases with decisions issued													
• Disposition of Post Decision cases‡			13		12								
Total Cases Disposed	141	176	200	196	172	195	155	143	207	131	166	186	2,068

Notes

† Columns show monthly additions only

‡ These are dispositions of Reconsideration Applications and Directions Requested

By the end of the reporting period, the Tribunal had also moved towards handling section 77 cases almost exclusively by way of written application. The parties prefer it, the process is faster than an oral hearing, and oral hearings are awkward when only one party has the disputed material.

We anticipate that with the integration of Intake and the Tribunal Counsel Office the trend to more expeditious handling of cases will accelerate in 1990.

French-Language Hearings

The Tribunal has two Panels that can conduct hearings in French. In 1989, the Tribunal held seven French hearings. In these cases, decisions are released in French, but an English version is available on request. The Tribunal now has a full-time French translator on staff who assists with the translation of documents for French hearings.

Comparative Caseload Statistics

	As at 31-Dec-1988	As at 31-Dec-1989
Cases at pre-hearing stage:†	1,510	1,134
Post-hearing cases:		
• Recessed	43	65
• Complete but on hold	101	138
• Ready to write decision	270	234
Total cases at post-hearing stage:	414	437
TOTAL CASELOAD	1,924	1,571

† This figure includes the pension-chronic pain cases which are on hold and post-decision issue cases.

Pension-chronic pain cases	269	229
Post Decision Issue Cases	129	147
TOTAL	398	376

POST-HEARING PROCESSING

About 20 per cent of the cases heard in 1989 required additional evidence, post-hearing. In those cases, Panels have found there is insufficient medical evidence to determine an issue, or that other kinds of information are required before a decision can be reached. There are also cases where it becomes apparent to the Panel, post-hearing, that further submissions from the parties or the Board are necessary before the decision can be fairly made.

The post-hearing co-ordinator in the Tribunal Counsel Office obtains the evidence required on the Panel's instructions or co-ordinates the submissions. In 1989, the co-ordinator made greater use of outside investigators in obtaining information and consequently the time taken in the post-hearing process was shortened considerably.

The post-hearing additional evidence is, of course, obtained after notice to the parties and with the parties being given full opportunity to respond to such evidence.

In 1989, there were 154 Medical Assessors who had been appointed as Order-In-Council appointments under Section 86h of the Act. The increased number of Assessors meant that Panels were able to obtain medical information post-hearing more quickly than before.

DECISION WRITING

The Office of the Counsel to the Chairman continued to review decisions in draft form. The Counsel to the Chairman's role has been described in earlier Annual Reports. In 1989, one additional full-time Counsel and one part-time Counsel were added, bringing the total to four. Counsel's role was expanded to provide increased research assistance to Panels, in addition to draft-decision review.

Beginning in January 1989, Panels agreed to attempt to release decisions, on average, within six weeks of the hearing date. Exceptions included the more complex cases or cases requiring additional evidence or submissions post-hearing. In 1989, the Tribunal released 1,181 decisions. The average release time for all decisions (from the point where they were ready to write to the release date) was 7.5 weeks. This represents a three-week improvement over the 1988 average. If the cases are broken down by type, special section cases are released on average within 4.8 weeks, following a hearing. Full-time Vice-Chairmen released their decisions in 1989 cases within 5.2 weeks on average. This represents a 27-per-cent improvement over 1988, and is well within the six-week average goal for the decision-writing process.

DECISION RELEASE

During the reporting year, the Tribunal implemented a new system of decision release. Decisions are now released through the Information Department within 24 hours of the Panel issuing the decision.

INFORMATION DEPARTMENT

LIBRARY

The Library provides reference and research services to Tribunal staff and the public. Reference questions are answered utilizing in-house computer databases and external databases, such as *Dialog*, *QL Systems*, *CAN/LAW* and *Westlaw*.

In order to meet the increasing requests for service by the public, the Library has established a readily identifiable central reference desk. Improved integration of the Information Department now allows Library staff to draw on the support of Publications lawyers when answering more legally complex queries.

The Library staff has trained other Tribunal personnel in the use of computer-assisted research on the Tribunal's own in-house database. Emphasis has shifted to encouraging training in the use of *WCAT ONLINE*, a far more powerful retrieval system which permits sophisticated searches of the full text of all Tribunal decisions.

PUBLICATIONS

The Publications department publishes materials designed to facilitate research of Tribunal decisions and to increase awareness of Tribunal processes. As of the end of the reporting period plans for a major restructuring of the Tribunal's publications have been completed. The new system will be implemented early in 1990. It features a new publication, the *Decision Digest Service*, which will replace the *Numerical Index of Decisions*.

The currency of the publications was much improved over the reporting period. Decisions are currently being summarized within a week of their release. Once the *Decision Digest Service* is in operation, the *Decision Summaries, Keyword Index and Annotated Statute* will be updated monthly rather than quarterly. Clearance of the backlog of cases to be published in the *WCAT Reporter* has also made that publication more current. These improvements have rendered the *Decision Subscription Service* redundant. It will be discontinued at the end of 1989.

Some new publications were made available in 1989. The *Keyword Guide* helps users to identify all the keyword terms that are potentially relevant to their searches of Tribunal decisions (this will be especially helpful considering the revisions to the *Keyword Index* that will be necessitated by the proclamation of *Bill 162*). *Researching Workers' Compensation Appeals Tribunal Decisions* describes the various Tribunal publications and databases and explains how to use the publications. *A Straightforward Guide to the Workers' Compensation Appeals Tribunal* is a plain language explanation of the Tribunal's function and procedures.

Plans are underway to introduce a Tribunal newsletter (*WCAT In Focus*). It will provide the Tribunal with the capacity to routinely communicate with its constituencies in a timely and efficient manner.

The following publications are available to assist in the research of Tribunal decisions:

- *WCAT Reporter*
- *Decision Digest Service*
- *Master List of Decisions*
- *Keyword Index*
- *Section 15 Index*
- *Keyword Guide.*

Other publications available are:

- *A Straightforward Guide to the Workers' Compensation Appeals Tribunal*
- *Researching Workers' Compensation Appeals Tribunal Decisions*
- *Compensation Appeals Forum*
- *Annual Report.*

PAY EQUITY

The Pay Equity Act, which came into force on January 1, 1988, requires employers in the public sector to post a Pay Equity Plan by January 1, 1990. The Tribunal decided that it was reasonable for it to follow the Ontario Public Service pay equity plan for non-union (called "management and excluded") employees when that plan became available.

The Tribunal notified employees of the decision in December 1989. The plan was posted early in 1990 and will result in approximately 72 Tribunal employees receiving wage adjustments in 1990 to meet the Pay Equity Act.

The Tribunal's decision to follow the OPS plan allows the Tribunal to implement the intent and the spirit of the pay equity legislation by providing us with "male comparitors" for the female job classes.

FINANCIAL MATTERS

As we present this Annual Report, the Statement of Expenditure for the year ended December 31, 1989, has not yet been subject to audit.

The Appeals Tribunal is currently undergoing an internal audit by the Audit Department of the Ministry of Labour. The external auditors who performed an audit of the Statement of Expenditures in 1988 will again be invited to perform an audit of the Statement of Expenditures for the year ended December 31, 1989.

Statement of Expenditures
As at December 31st, 1989

Salaries and Wages	1989 Budget	1989 Actual
1310 Salaries & Wages - Regular	4,338.0	4,258.0
1320 Salaries & Wages - Overtime	36.0	54.2
1325 Salaries & Wages - Contract	298.8	193.7
1510 Temporary Help - Go Temp.	40.0	4.5
1520 Temp. Help - Outside Agencies	35.0	145.8
Total Salaries and Wages	**4,747.8**	**4,656.3**
Employee Benefits		
2110 Canada Pension Plan	0.0	56.1
2130 Unemployment Insurance	0.0	81.7
2220 Pub. Ser. Superannuation Fund	0.0	134.8
2230 P.S.S.F. Adjustment Fund	0.0	28.3
2310 Ontario Health Insurance Plan	0.0	49.6
2320 Suppl. Health & Hospital Plan	0.0	25.1
2330 Long-term Income Protection	0.0	20.0
2340 Group Life Insurance	0.0	8.1
2350 Dental Plan	0.0	24.1
2410 Workers' Compensation	0.0	0.1
2520 Maternity Supp. Benefit All.	0.0	18.7
2990 Benefits Transfer	0.0	1.2
Total Employee Benefits	**740.2**	**447.8**
Transportation & Communication		
3110 Courier/Other Delivery Charges	30.0	32.8
3111 Long Distance Charges	15.0	16.9
3112 Bell Tel. - Service, Equipment	50.0	68.7
3210 Postage	60.0	24.3
3610 Travel - Accommodation & Food	113.7	70.0
3620 Travel - Air	0.0	49.8
3630 Travel - Rail	0.0	2.4
3640 Travel - Road	0.0	26.9
3660 Travel - Conferences, Seminars	25.0	18.9
3680 Travel - Attendance (Hearings)	35.0	57.6
3690 Travel - Prof. & Pub. Outreach	10.0	4.1
3720 Travel - Other	1.0	4.8
3721 Travel - PT Vice Chair & Reps.	57.0	40.1
Total Transportation & Communication	**396.7**	**417.3**

Services	1989 Budget	1989 Actual
4124 External Education & Training	5.0	0.2
4130 Advertising - Employment	10.0	12.5
4210 Rentals - Computer Equipment	0.0	13.1
4220 Rentals - Office Equipment	10.0	0.8
4230 Rentals - Office Furniture	1.0	0.0
4240 Rentals - Photocopying	130.0	91.6
4260 Rentals - Office Space	800.0	1,011.4
4261 Rentals - Hearing Rooms	20.0	22.6
4270 Rentals - Other	1.0	0.0
4310 Data Process Service	10 0	0.0
4320 Insurance	0.0	0.0
4340 Receptions - Hospitality	27.0	32.8
4341 Receptions - Rentals	1 0	0.3
4350 Witness Fees	30.0	27.6
4351 Process Services - Subpoenas	7.0	5.7
4360 Per Diem Allow.-PT VC & Reps.	512.0	377.7
4410 Consultants - Mgt. Services	70.0	94.7
4420 Consultant - System Development	0.0	37.7
4430 Court Reporting Services	125.0	117.1
4431 Consultants - Legal Services	50 0	19.1
4435 Transcription	125.0	145.8
4440 Med. Fee - Per Diem/Retainer Rep	225.0	132.8
4460 Research Services	0.0	0.0
4470 Print - Dec./Newsletters/Pamphlets	210.0	172.2
4520 Repair/Main. - Furnit./Off. Equip.	100.0	148.2
4710 Other - incl. Membership Fees	30 0	48.8
4711 Translation & Interpret. Ser.	60.0	44 3
4712 Staff Development - Course Fees	50.0	38 9
4713 French Translation Services	90.0	38.0
4714 Other French Costs	0.0	0 0
Total Services	**2,699.0**	**2,633.9**
Supplies & Equipment		
5090 Projectors, Cameras, Screens	0.0	0.0
5110 Computer Equip. incl. Software	0.0	0.2
5120 Office Furniture & Equipment	30.0	2.3
5130 Office Machines	0.0	0.0
5710 Office Supplies	100.0	139.6
5720 Books, Publications, Reports	50.0	51.5
Total Supplies & Equipment	**180.0**	**193.6**
Total Operating Expenditures	**8,763.7**	**8,348.9**
Capital Expenditures	**100.0**	**148.5**
Total Expenditures	**8,863.7**	**8,497.4**

APPENDIX A

STATEMENT OF MISSION, GOALS AND OBJECTIVES

THE MISSION

In its most fundamental terms, the Tribunal's mission is to perform appropriately the duties assigned to it by the *Workers' Compensation Act*.

These duties are both explicit and implicit. The explicit assignments define what the Tribunal must do and are, generally speaking, clear. They need not be repeated here.

The implicit obligations identify the manner of the Tribunal's operations. By definition, the nature of those obligations is subject to interpretation and debate, and it is important that the Tribunal's perceptions in that respect be known.

The implicit statutory obligations as the Tribunal understands them may be usefully described in the following terms.

1. The Tribunal must be competent, unbiased and fair-minded.

2. The Tribunal must be independent.

The obligation to be independent has three essential facets:

(a) The maintenance of an arms-length, independent relationship with the Workers' Compensation Board.

(b) A commitment by the chairman, vice-chairs and members to not being inappropriately influenced by the popular views of workers or employers.

(c) A commitment by the chairman, vice-chairs and members to being undeterred by the possibility of government disapproval.

3. The Tribunal must utilize an appropriate adjudication process. To be appropriate, the Tribunal believes the process must generally conform with the following basic concepts:

(a) The process must be recognized as not being an "adversarial" process as that concept is generally understood in a common-law context.

(Unlike a court, the Tribunal is not engaged in resolving a contest between private parties. Appeals to the Tribunal represent a stage in the workers' compensation system's investigation of the statutory rights and benefits flowing from an industrial injury.

It is a stage of the system's process that is invoked on the initiative of a worker or employer but in this stage, as in earlier stages of the process, it is the system and not the worker or the employer which has the burden of establishing what the Act does or does not provide with respect to any reported accident.

The fact that it is the system which has the primary responsibility in this respect is reflected in the Board's and the Tribunal's explicit investigative mandates and their respective statutory obligations to decide cases on the basis of their "real merits and justice".

In legal terminology the process may be characterized as an "inquisitorial" as opposed to an "adversarial" process.

Despite the non-adversarial or inquisitorial nature of the process, it is a fact that the Tribunal's hearings normally take much the same form as do hearings in a typical adversarial process. To the uninitiated, the use of what is essentially an adversarial hearing format is confusing as to the fundamental nature of the Tribunal's process. In fact, however, the adversarial format merely reflects the Tribunal's tacit recognition that the participation of the parties in that manner will meet expectations in that regard and will, as well, be usually both the most effective and the most satisfying way for parties to, in fact, contribute to the Tribunal's search for the real merits and justice.

The Tribunal's commitment, in a non-adversarial process, to an essentially adversarial hearing format is also bolstered by its appreciation of the Canadian legal system's concept of what constitutes a "hearing". The legal system's understanding of the principles of natural justice that apply where there is, as there is here, a right to a hearing, are such that even in a non-adversarial process the style of hearing would not in law be allowed to stray far from the basic adversarial format.)

(b) The non-adversarial nature of the process in which the Tribunal is engaged evokes the following three, particularly significant special process imperatives.

(i) The Tribunal's hearing panels have a responsibility to take such steps as they may find necessary to satisfy themselves that in any particular case they have such reasonably available evidence as they require to be confident as to the actual merits and justice in that case.

(ii) The issue agenda in any case must ultimately be determined by the hearing panels and not dictated by the parties.

(iii) The manner of conducting a hearing, while usually to be governed by rules and format of a standard nature, must be adaptable to the special hearing needs of any particular case as the hearing panel in that case may consider necessary or appropriate. Any such adaptations must, however, be consistent with a fair hearing and reflect proper regard for the integrity of general Tribunal rules and procedures that are conducive to effective and fair process from an overall perspective.

(c) The adjudication process must be effective and fair from the parties' perspective.

It must allow the parties timely knowledge of the issues, a fair opportunity to challenge or add to evidence and/or to provide their own evidence, and a fair opportunity to advocate their views and to argue against opposing views.

(d) The process must also be effective from the perspective of the Tribunal.

It must provide the Tribunal's panels with the evidence, the means of evaluating the evidence, and the understanding of the issues, which will permit them to decide with confidence on the real merits and justice of the case.

(e) The process should not be more complicated, regulated, or formal (and, thus, not more intimidating to lay participants) than the requirements of effectiveness and fairness and the needs of reasonable efficiency dictate.

(f) In the post-hearing phase, the decision-making process must provide full opportunity for effective tripartite decision-making and for the careful development of appropriate decisions.

To be appropriate, decisions must be written and fully-reasoned. They must conform to the rule of law and meet reasonable, general standards of decision quality. Applicable law must be given its due effect and the principles adopted in other Appeals Tribunal decisions must be shown appropriate deference. The goal of achieving like results in like fact situations must be sensibly pursued.

4. The process for dealing with applications, as distinguished from appeals, while conforming generally with the foregoing, must be subject to such variations as the special statutory provisions governing each of the various applications may anticipate.

5. The Tribunal must hold hearings and reach decisions in as timely a fashion as is reasonably possible given the foregoing process obligations.

6. The Tribunal must make all its decisions readily accessible to the public.

7. The Tribunal's services must be reasonably accessible in both the French and English languages.

GOALS

In pursuing its mission, the Tribunal has adopted the following specific goals.

1. Achieving a total case turnaround time from notice of appeal or application to final disposition that averages four months, and in individual cases, unless they are of unusual complexity or difficulty, does not exceed six months.

2. Providing a system which can, so far as is reasonably possible, meet the various implicit statutory imperatives regardless of the experience or capabilities in a particular case of the worker's or employer's representative, or the absence from the process of any party or representative.

3. Maintaining at all points of contact between the Tribunal and workers and employers and their representatives a welcoming, empathetic, non-intimidating and constructive professional environment — an environment grounded in implicit respect on the part of all Tribunal staff and members for the goals and motives of workers and employers involved in the Tribunal's processes and for the importance of the Tribunal's work on their behalf.

4. Maintaining a working environment for Tribunal staff that provides both challenging work and suitable opportunities for personal recognition, development and advancement, in an atmosphere of mutual respect.

5. Maintaining at all times a sufficient complement of qualified, competent, trained and committed vice-chairs and members.

6. Maintaining at all times a sufficient roster of qualified and committed medical assessors.

7. Maintaining at all times a sufficient complement of qualified, competent, trained and committed administrative and professional staff.

8. Providing the physical facilities, equipment and administrative support services necessary for the vice-chairs, members and staff to perform their responsibilities efficiently and in a manner which is conducive to job satisfaction and consistent with professional expectations.

9. Within such restrictions as may be implicit in the chairman's statutory obligation to take as his or her guidelines in the establishment of job classifications, salaries and benefits the administrative policies of the Government, compensating staff fairly and competitively relative to their responsibilities and the nature of their work.

10. Maintaining a constructive and appropriate working relationship with the medical profession and its members, generally, and with the Tribunal's medical assessors, in particular.

11. Maintaining a constructive and appropriate working relationship with the Board and its staff and with the Board's board of directors.

12. Maintaining a constructive and appropriate working relationship with the Minister and Ministry of Labour and with such other components of the government structure with which the Tribunal has dealings from time to time.

13. Providing the public and, in particular, workers and employers and their respective communities and representatives with such information about the Appeals Tribunal and its operations as is necessary for the effective utilization of the Tribunal's services.

COMMITMENTS

In the performance of the Tribunal's Mission and in the pursuit of its Goals, the Tribunal has recognized a number of matters to which it is effectively committed.

1. The Tribunal is committed to keeping the investigative and pre-hearing preparation activities of the Tribunal separate from its decision-making activities.

This is accomplished by means of a permanent department of full-time professional staff referred to as the Tribunal Counsel Office (the TCO). TCO's assignment in this regard is to perform the Tribunal's investigative and pre-hearing preparation work. This work is to be performed in accordance with general standing instructions of the Tribunal. In individual cases where pre-hearing investigation or preparation requirements appear to exceed such standing instructions, TCO will act in accordance with special instructions from Tribunal panels — panels whose members are not thereafter permitted to participate in the hearing and deciding of such cases.

2. The Tribunal is committed to Tribunal-monitoring, at the pre-hearing stage, of the identification of issues and the sufficiency of evidence.

As part of the commitment to separation of pre-hearing investigation and preparation activity from decision-making activity, this monitoring is normally carried out by the TCO pursuant to Tribunal instructions delivered in the manner described above.

(This commitment does not preclude variable strategies concerning the degree of pre-hearing monitoring and the amount of TCO initiative in the pre-hearing preparation, with respect to different categories of cases. It also contemplates the possibility of TCO not monitoring particular categories of uncomplicated cases.)

It is, of course, understood that the TCO's pre-hearing role does not diminish in any way the hearing panels' intrinsic rights and obligations in the hearing and determining of individual cases. Hearing panels have the final say in the identification of issues and, at a mid-hearing or post-hearing phase, the right to initiate and supervise the development or search for additional evidence, or to obtain further legal research or request additional submissions.

3. The Tribunal is committed to having the Tribunal represented by its own counsel at any Tribunal hearing where the Tribunal considers such representation necessary or useful.

4. In its internal decision-making processes, the Tribunal is committed to the maintenance of a tri-partite working environment characterized by mutual respect and by free and frank discussions based on non-partisan, personal best judgements from all panel members.

5. The Tribunal is committed to maintaining internal educational processes suitable for developing a Tribunal-wide, comprehensive appreciation of the nature and dimensions of emerging, generic, medical, legal or procedural issues.

6. The Tribunal is committed to the establishment and maintenance of a general workers' compensation information resource and library.

This resource and library is to be a sufficient and effective source of legal, medical, and factual information relevant to the workers' compensation subject. It shall provide access to information which is not conveniently assembled elsewhere, and which workers and employers, members of the public, professional representatives, and Members and staff of the Tribunal require if they are to truly understand the workers' compensation system and the issues which it presents, or be able to prepare on a fully informed basis for presenting or dealing with such issues in individual cases.

This information is to be readily accessible through electronic and other means.

7. The Tribunal is committed to the creation of a permanent, widely distributed and easily accessible, published record of the Tribunal's work.

This record is to consist of the selection of Tribunal decisions best calculated to assist worker or employer representatives to understand, in the preparation of their cases, workers' compensation issues and the Tribunal's developing position on such issues.

8. The Tribunal is committed to the review by the chairman, or by the Office of the Counsel to the chairman, of draft panel decisions.

This review is conducted for the purpose of ensuring — to the extent possible given the overriding hearing-panel autonomy, that the Tribunal's body of decisions complies reasonably with the general hallmarks of quality which the Tribunal has recognized.

9. The Tribunal is committed to devoting its best efforts to having Tribunal decisions comply reasonably with the following hallmarks of a good-quality adjudicative decision:

(a) It does not ignore or overlook relevant issues fairly raised by the facts.

(b) It makes the evidence base for the panel's decisions clear.

(c) On issues of law or on generic medical issues, it does not conflict with previous Tribunal decisions unless the conflict is explicitly identified and the reasons for the disagreement with the previous decision or decisions are specified.

(d) It makes the panel's reasoning clear and understandable.

(e) It meets reasonable standards of readability.

(f) It conforms reasonably with Tribunal standard decision formats.

(g) From decision to decision the technical and legal terminology is consistent.

(h) It contributes appropriately to a body of decisions which must be, as far as possible, internally coherent.

(i) It does not support permanent conflicting positions on clear issues of law or medicine. Such conflicts may occur during periods of development on contentious issues. They cannot be a permanent feature of the Tribunal's body of decisions over the long term.

(j) It conforms with applicable statutory and common law and appropriately reflects the Tribunal's commitment to the rule of law.

(k) It forms a useful part of a body of decisions which must be a reasonably accessible and helpful resource for understanding and preparing to deal with the issues in new cases and for invoking effectively the important principle that like cases should receive like treatment.

10. The Tribunal is committed to obtaining in each case such reasonably available evidence as its hearing panels require if they are to be confident as to the appropriateness of their decision on any factual or medical issue.

11. The Tribunal is committed to holding hearings at appropriate out-of-Toronto locations.

The commitment in this respect is that cases originating out of Toronto should be heard at locations which are reasonably convenient from both the worker's and employer's perspective. This commitment is subject to the limit of not imposing travel obligations on Tribunal members or administrative burdens on the Tribunal so onerous as to interfere with the effective operation of the Tribunal in other respects.

12. The Tribunal is committed to the payment of expenses and compensation in respect of lost wages arising from attendance at Tribunal hearings in accordance with the WCB's policies in that regard with respect to attendance at WCB proceedings.

13. The Tribunal is committed to paying for medical reports which serve a reasonable purpose in the Tribunal's proceedings.

14. The Tribunal is committed to being fiscally responsible in the management of its expenditures to the end that only moneys necessary for the performance of the Tribunal's mission and the accomplishment of the Tribunal's goals are, in fact, spent.

This document reflects the Tribunal's Mission, Goals and Commitments as at least implicitly understood from the Tribunal's inception.[1] Their expression in these particular terms was approved by the Tribunal as of October 1, 1988.

1 The single exception is Goal No. 1. The original turnaround goal was six months.

APPENDIX B

VICE-CHAIRMEN AND MEMBERS ACTIVE IN 1989

FULL-TIME	DATE OF FIRST APPOINTMENT
Chairman	
Ellis, S. Ronald	October 1, 1985
Alternate Chair	
Bradbury, Laura	June 1, 1988
Vice-Chairmen	
Bigras, Jean Guy	May 14, 1986
Bradbury, Laura	October 1, 1985
Carlan, Nicolette	October 1, 1985
Kenny, Lila Maureen	July 29, 1987
McIntosh-Janis, Faye	May 14, 1986
Moore, John P.	July 16, 1986
Onen, Zeynep	October 1, 1988
Signoroni, Antonio	October 1, 1985
Starkman, David K.L.	August 1, 1988
Strachan, Ian J.	October 1, 1985
Members Representative of Workers	
Cook, Brian	October 1, 1985
Fox, Sam	October 1, 1985
Heard, Lorne	October 1, 1985
Lebert, Raymond J.	June 1, 1988
McCombie, Nick	October 1, 1985
Robillard, Maurice	March 11, 1987
Members Representative of Employers	
Apsey, Robert	December 11, 1985
Jago, W. Douglas	October 1, 1985
Meslin, Martin	December 11, 1985
Nipshagen, Gerry M.	October 1, 1988
Preston, Kenneth	October 1, 1985
Seguin, Jacques	July 1, 1986
Guillemette, Karen	May 28, 1986

PART-TIME

Vice-Chairmen	
Aggarwal, Arjun	May 14, 1986
Chapnik, Sandra	March 11, 1987
Farb, Gary	March 11, 1987
Faubert, Marsha	December 10, 1987
Friedmann, Karl	December 17, 1987
Hartman, Ruth	December 11, 1985
Lax, Joan L.	May 14, 1986
Leitman, Marilyn	December 17, 1987
Marafioti, Victor	March 11, 1987
Marcotte, William A.	May 14, 1986
Marszewski, Eva	May 14, 1986
McGrath, Joy	December 10, 1987
Sperdakos, Sophia	May 14, 1986

Stewart, Susan L.	May 14, 1986
Swartz, Gerald	March 11, 1987
Torrie, Paul	May 14, 1986
Warrian, Peter	May 14, 1986
Wydrzynski, Christopher	March 11, 1987

Members Representative of Workers

Acheson, Michelle	December 11, 1985
Beattie, David Bert	December 11, 1985
Byrnes, Frank	May 14, 1986
Drennan, George	December 11, 1985
Felice, Douglas H.	May 14, 1986
Ferrari, Mary	May 14, 1986
Fuhrman, Patti	May 14, 1986
Higson, Roy	December 11, 1985
Jackson, Faith	December 11, 1985
Klym, Peter	May 14, 1986
Lankin, Frances	December 11, 1985
Rao, Fortunato	February 11, 1988

Members Representative of Employers

Clarke, Kenneth	August 1, 1989
Gabinet, Mark	December 17, 1987
Howes, Gerald K.	August 1, 1989
Jewell, Donna Marie	December 11, 1985
Kowalishin, Teresa A.	May 14, 1986
Merritt, Allen S.	October 18, 1988
Ronson, John	December 11, 1985
Seguin, Jacques A.	July 1, 1986
Shuel, Robert	August 1, 1989
Sutherland, Sara	December 17, 1987

The following is a list of senior staff who were employed at the Appeals Tribunal during the reporting period.

Counsel to the Chairman

Carole A. Trethewey

Tribunal General Counsel

Elaine Newman – to June 15, 1989
Eleanor J. Smith – from December 1, 1989

(Acting) General Counsel

Janice Sandomirsky – June 16, 1989, to November 30, 1989

General Manager

Robert A. Whitelaw – to June 30, 1989

Head, Information Department

Linda Moskovits

SENIOR STAFF CHANGES

On June 16, 1989, Elaine Newman, the Tribunal's General Counsel resigned to take up a career in private practice. Janice Sandomirsky, one of the Tribunal Counsel Office's Senior Legal Counsel, assumed the position of Acting General Counsel while the recruiting process was completed by an internal selection committee. Eleanor J. Smith was appointed the Tribunal's new General Counsel, effective December 1, 1989. Eleanor came to the Tribunal from her position as Director of Appeals at the Ministry of Labour, where she was responsible for hearing and determining all ap-

peals from Ministry of Labour decisions under the Occupational Health and Safety Act, and with a background of government administrative law advocacy in the energy field.

Also, on June 30, 1989, Robert Whitelaw, the Tribunal's General Manager resigned to accept a position with the government of British Columbia. At that time, it was decided that we would not fill the vacancy but would, instead, take the opportunity to experiment with a more flattened management structure, with the General Manager's responsibilities being delegated to senior staff members. We have not, as yet, had enough experience to be confident that it will be sensible in the long term to permanently dispense with a General Manager position, and expect to be able to make that decision sometime towards the end of 1990.

MEDICAL COUNSELLORS

The Medical Counsellors have continued to assist the Counsel Office in determining what, if any, further medical investigation ought to be explored in order to ensure that Panels have enough medical information to understand the evidence before them in any particular case, and to understand where and why any controversies exist.

The Counsellors have also continued to contribute to the Tribunal's recruitment of candidates for the Medical Assessor Roster. This year has seen the creation of a number of generic discussion papers on a number of medical issues. The Counsellors have been of assistance, either authoring these papers, or assisting in finding appropriate specialists from the Assessor Roster to do so.

Dr. Brian Holmes (see Second Report, page 21), who previously coordinated the Medical Counsellors has taken a leave of absence to accept a position as Vice-Chancellor, Health Sciences for the University in the United Arab Emirates. Dr. Holmes was a founding Counsellor and was instrumental in assisting the Tribunal as it set up its medical resource bodies.

Dr. Holmes' leadership role has been assumed by Dr. Thomas P. Morley.

This year, Dr. Ian Macnab, Orthopaedic Surgeon, resigned for personal reasons. Dr. Macnab's assistance and keen interest in enhancing our understanding of orthopaedic issues, especially in our first few formative years has been greatly appreciated.

One of the Tribunal's 86h Assessors, Dr. W.R. Harris, has been performing the role of Orthopaedic Counsellor on an ad hoc basis. His other commitments do not permit him to officially assume the responsibilities of a Counsellor at this time.

This leaves the Tribunal with seven Counsellors.

The following is a list of the Tribunal's Medical Counsellors:

Dr. Douglas P. Bryce	Otolaryngology
Dr. John S. Crawford	Ophthalmology
Dr. W.R. Harris	Orthopaedics (Acting)
Dr. Fred Lowy	Psychiatry
Dr. Robert L. MacMillan	Internal Medicine
Dr. Thomas P. Morley	Neurology
Dr. Neil Watters	General Surgery

ASSESSORS

As reported in the Second Report, a second expanded list of Assessors was appointed on October 1988. This brought the total of medical assessors throughout the province to 154 - now less nine (mainly through retirement from practice). There are currently 14 assessor nominations in process, and their appointments are anticipated in the near future.

VICE-CHAIRMEN AND MEMBERS — RE-APPOINTMENTS

In 1989, the following full- and part-time Vice-Chairmen and Members were re-appointed to the Appeals Tribunal for the terms indicated below.

NAME	DATE OF RE-APPOINTMENT	TERM (IN YEARS)
FULL-TIME		
Vice-Chairmen		
Bradbury, Laura[1]	October 1	3
McIntosh-Janis, Faye	May 14	3
Members Representative of Employers		
Guillemette, Karen	May 14	3
Nipshagen, Gerry[2]	June 15	3
Seguin, Jacques	July 1	6 mos. full-time; 2.5 years part-time
Cook, Brian	October 1	3
PART-TIME		
Vice-Chairmen		
Lax, Joan	May 14	2
Marcotte, William	May 14	2
Sperdakos, Sophia	May 14	3
Stewart, Susan	May 14	3
Members Representative of Employers		
Kowalishin, Teresa	May 14	3
Members Representative of Workers		
Felice, Douglas	May 14	3
Ferrari, Mary	May 14	3
Fuhrman, Patti	May 14	3
Klym, Peter	May 14	3

1 In addition to her duties as a Vice-Chairman at the Appeals Tribunal, Laura Bradbury is continuing in her management position as Alternate Chair.

2 Mr. Nipshagen was first appointed to the Appeals Tribunal as a part-time Member representative of employers. He was appointed as a full-time Member in June to fill the vacancy created by the resignation of Karen Guillemette.

VICE-CHAIRMEN AND MEMBERS — APPOINTMENTS EXPIRED AND RESIGNATIONS

The following is a list of members who resigned or whose appointments expired during the reporting period.

Arjun Aggarwal, Vice-Chairman	(part-time)
Frank Byrnes, Tribunal Member representative of workers	(part-time)
Karen Guillemette, Tribunal Member representative of employers	(full-time)
Eva Marszewski, Vice-Chairman	(part-time)
Allen S. Merritt, Tribunal Member representative of Employers	(part-time)
Paul Torrie, Vice-Chairman	(part-time)
Peter Warrian, Vice-Chairman	(part-time)

VICE-CHAIRMEN AND MEMBERS — RÉSUMÉS

NEW APPOINTMENTS

Kenneth Clarke (Part-time Employer Member)

Mr. Clarke, a human resources consultant with his own consulting firm (dealing in non-workers'-compensation-related matters), spent 20 years in the food business as the Director of Human Resources at Thomas J. Lipton, Inc. In this position he was responsible for personnel and industrial relations matters. He is currently a member of the Government Affairs Advisory Committee of the Personnel Association of Ontario.

Gerald K. Howes (Part-time Employer Member)

Prior to his part-time appointment, Mr. Howes was employed by General Motors for 32 years. His position when retired was that of Workers' Compensation Personnel Representative. In this position, he spent the greater part of the period between 1972 and 1988 representing General Motors at all levels of workers' compensation claims and primary adjudication in the appeals process up to the Hearings Officer level.

Robert Shuel (Part-time Employer Member)

During the period between 1980 and 1989, Mr. Shuel was employed as Director and Secretary-Treasurer for Cuddy International Corporation. In additional to personnel administration, Mr. Shuel was involved in workers' compensation assessment and claims procedures. During this period, he was responsible for workers' compensation and claims management for a Windsor-based construction company where he was project payroll and office manager. Mr. Shuel was also involved in a workers' compensation educational role with the Agricultural Employers Council.

For brief résumés of the previously appointed full- and part-time Vice-Chairmen and Members, please refer to Appendix B of the Third Report.